RECENT CASES

ASSIGNMENT.

Assignment of a Definite Part of an Existing Debt is Valid

The defendant was indebted to one Howard in a definite sum. Howard became obligated to the plaintiffs for professional services rendered, and assigned by deed to the plaintiffs so much of the said debt as would cover all proper costs and charges not exceeding in the whole £30, and the plaintiffs gave notice of the assignment to the defendant. A bill of costs, &c., for £32 was presented to Howard but apparently not paid, and the plaintiffs brought suit claiming the £30 as part of the debt due from defendant to Howard and assigned by deed to the plaintiff. The defense was that the assignment was invalid because it is merely an assignment of part of a debt. Sec. 25, sub-sec. 6 of Judicature Act 1873, "Any absolute assignment, by writing * * * of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor * * * shall be effectual in law * * *."

Held, by Darling, J.: Where there is an existing debt there can be a valid assignment of a defined portion of it. Judgment for the plaintiff for £30. *Skipper & Tucker* v. *Holloway and another*, 79 L. J., 1 K. B. [1910] 91.

The point here raised was *res nova* in the courts of England. The question had previously been discussed in several cases but no exact opinion had been given upon it. It is said the courts have avoided deciding it. 1 Enc. of Laws of Eng. 565. The language of Lord Coleridge, C. J., in *Brice* v. *Bannister*, 1878, 3 Q. B. D. 569, was broad enough to support the rule that a portion of any debt could be assigned. That rule is followed in *ex parte Moss*, 1884, 14 Q. B. D. 310. In recent years, however, the English judges have cast doubt on the correctness of these decisions. *Durham Bros.* v. *Robertson* [1898], 1 Q. B. 744; *Jones* v. *Humphries* [1902], 1 K. B. 10; *Hughes* v. *Pump House Co.* [1902], 2 K. B. 190. In the second of these cases Darling, J., himself lent his authority to the doubt, rather of the state of the law in England than of the soundness of any rule.

Alexander v. *Steinhardt, Walker & Co.* [1903], 2 K. B. 208, may be distinguished. There a principal directed his factor to sell certain goods and out of the proceeds to pay B £400, and the balance to Alexander, and advised the latter of what he had done. It was held at *nisi prius* that this constituted a valid assignment to Alexander. Presumably the £400 had been paid to B, and therefore the assignment to Alexander was total. The assignment embraced a complete power of attorney for all that was then owing the assignor.

At common law the partial assignee acquired no rights. The injustice of submitting the debtor to a multiplicity of suits on the same cause of action was sufficient to establish the rule at law. *Jermyn* v. *Moffatt*, 75 Pa. 399. But in equity, the partial assignee was fully protected. His right was in the nature of enforcing an obligation on the assignor to give to him the share in the proceeds of the chose in action when the assignor collected it. *Caldwell* v. *Hartafee*, 70 Pa. 74. It has

ASSIGNMENT (Continued).

been thought that the nature of this right was in analogy to an equitable charge on land, the subject of the charge being the chose in action. *Ames' Cases on Trusts,* 64 note. On the other hand the total assignee at common law, acquired rights which, in the absence of special circumstances, he could enforce only at law. *Hammond* v. *Messenger,* 9 Sim. 327 (Eng. 1838). His right was a power of attorney to sue at law in the assignor's name. In the absence of statutes he could not sue in his own name. The sub-section cited of the Judicature Act, gave him that power by providing that the assignment should "be effectual in law to pass and transfer the legal right." The Court in the principal case have thought this sufficient to cover an assignment of a part of the chose in action. In America the general rule would appear to be the other way and the partial assignee is compelled to work out his rights in equity against the assignor.

BANKRUPTCY.

Counter-Claim by Trustee

A referee in bankruptcy made an order denying the motion of the petitioner to quash objections filed to his claim by the trustee. The objections admitted the petitioner's claim but set up a counter claim greater than the amount of the petitioner's demand. The counter claim was alleged to have arisen out of a certain contract induced by false and fraudulent representations of the petitioner. The Court admitted the counter claim. *In re Harper,* 175 Fed. 412.

Under Sec. 70 a (6) of the amended Act "rights of action arising upon * * * injury to, his property" pass to the trustee. A claim may be the subject of set off though it is unliquidated. Collier, Bankruptcy (7th Ed.), Sec. 70a (6). The provision of the act which denies the right to prove a claim founded on the fraud of the bankrupt does not apply to a claim in which the trustee is relying on the fraud of the creditor as the basis of the counter claim. The Court was of the opinion that the facts upon which the counter claim was alleged to have arisen would constitute a cause of action arising out of injury to the bankrupt's property, and as such passed to the trustee. The decision in *In re Becker,* 139 Fed. 366, 15 A. B. R. 228, was criticised on the ground that it would be absurd to require the referee to allow a claim upon which a cross action might be maintained, to compel the trustee to pay dividends upon it, and then to sue in a separate action to recover damages due the estate. In support of this argument, the Court cited the words of Sec. 68a of the Act, "In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." Thus the Court considered the above counter claim to be a debt within the meaning of the above section, and treats this section as applying to cases where there is potentially a debt as well as to cases where the actual debt has been finally established.

Although this preliminary question was decided according to the contention of the trustee, it was still necessary that the facts upon which the counter claim was based be satisfactorily shown. The Court intimated that the case did not show such evidence of misrepresentation as was asserted by the trustee, but that question was not properly before them and was not fully discussed.

BANKRUPTCY (Continued).

Stock Exchange Seat as Asset

It has been held for many years as settled law, that upon the bankruptcy of a member of a stock exchange his seat, subject to the rules of the exchange, passes to his trustee. Where the rules of the exchange provide that the proceeds of the sale of the seat shall be used to satisfy the claims of other members before those of outside creditors, it is considered that they are neither contrary to public policy or to the Bankrupt Act, and that they must be obeyed by the trustee. *Hyde* v. *Woods,* 94 U. S. (1876) 523; *In re Page,* 107 Fed. Rep. (1901) 89; affirmed 187 U. S. (1903) 596; *In re Werder,* 10 Fed. Rep. (1882) 275; 15 Fed. Rep. (1883) 789.

In re Gregory, 174 Fed. Rep. (1910) 629, carries the proposition one step further. The bankrupt's assets there consisted of his seat, which as stated above would pass to the trustee subject to the rules, and the profits accruing from some of his transactions on the Consolidated Exchange (N. Y.) amounting to some $315.00 which were collected by the Exchange. These moneys the trustee laid claim to.

The Court considering the right to buy and sell stocks on the Exchange a sort of license, *Hyde* v. *Woods, supra,* decided that the profits arising from the exercise of the license were of the same nature as the money arising from the sale of the license itself, and so passed to the trustee subject to the rules and regulations of the Exchange. These provided that they should first be devoted, like the proceeds of the seat, to satisfying the claims of members, and as the liabilities of the bankrupt to his fellow brokers far exceeded the total amount realized both from the sale of his seat and the collection of his profits, the application of the trustee was denied and the Exchange allowed to keep the money, thus establishing a rule which should be of considerable practical importance.

CONTRACTS.

Infants: Necessaries: Recovery of Money Paid

In *Nielson* v. *International Text-Book Co.,* 75 Atl. (Me.) 330 (1909), an infant sought to recover the consideration money, which he had paid under a contract. The contract called for a correspondence course in electrical engineering. The infant made several payments and then decided to avoid the contract. He returned several books, which he had received and then brought suit to recover the money. The defense was that the contract was for necessaries, which of course raised the point, what is a necessary? The lower Court charged, "the term necessaries generally speaking is not confined merely to such things as are required for bare subsistence but includes those things without which an individual cannot reasonably exist, and which are useful, suitable and necessary for his support, use and comfort, taking into consideration his station in life" and left the question to the jury. The Supreme Court affirmed this ruling, holding that it was a question for the jury except in a very clear case. This is the view adopted by most jurisdictions and it is based on good reasoning. Obviously some things are not necessaries at present, as for instance an aeroplane, but where there is a fair question of its being a necessary, owing to the infant's station in life, it must be left to the jury. And this is the usual result. See *Davis* v. *Caldwell,* 66 Mass. 512 (1853).

CONTRACTS (Continued).

It was also decided, that the infant could sue for his money paid on the voidable contract without putting the defendant in *statu quo*. Here the goods supplied were returned, but the same ruling has been made where the infant has squandered or destroyed the property. The more general rule is only to compel return of property if he has it, and not to make him account for any depreciation in value. Some jurisdictions are *contra* on this point, notably New York. See *Wheeler & Wilson Mfg. Co.* v. *Jacobs*, 2 Misc. Rep. 236 (1893).

EXECUTION.

Sheriff Breaking Outer Doors

The ground floor of a building was used by the plaintiff as a store, and the floor above as a dwelling-house. There was no internal communication between the apartments upstairs and the store below. The upstairs portion was reached by steps, which were outside the building altogether, and through a door on the upstairs flat. The defendant, a sheriff, in levying under an execution process against the plaintiff, broke open the outer door of the store and seized goods therein. It was held that this was a breaking of the outer door of a dwelling-house, that the seizure was unlawful, and that the sheriff was responsible in damages to the plaintiff. *Hudson* v. *Fletcher*, 12 Western Canada, 15 (1909).

It is settled law that the outer door of a man's dwelling-house may not be broken open by a sheriff in executing process. *Lee* v. *Gansel*, 1 Cowp. 1. The reason assigned is that "otherwise the consequences would be fatal, for it would leave the family within naked and exposed to thieves and robbers." This reason would not seem to apply to our principal case, for the family would be no more exposed to thieves and robbers by the door of the store being forced, than they were before, since there was no communication between the two. However, the Court lays down the stricter rule, that in order to justify the breaking of an outer door, the building must not be connected with the dwelling-house nor within the curtilage.

Instances where the same building has been used for a store and a dwelling are rare in this line of cases. A one-roomed building, which was used for both a dwelling and a store, was held to be a dwelling house. *Welsh* v. *Wilson*, 34 Minn. 92 (1885). But in a case, exactly like our principal case, except that there was internal communication between the store and the dwelling above, and the door of the store was used both to get into the store and into the apartments above, it was held that it was lawful for the sheriff to break open the door of the store, as it was not a dwelling house. The door to the dwelling room upstairs was considered the outer door. The reason given was that otherwise all protection could be taken from the occupants of the dwelling above. The sheriff might easily gain admittance to the store peaceably and then be able to break open the doors to the rooms above, since they would then be inner doors. *Stearns* v. *Vincent*, 50 Mich. 209 (1883). Our principal case would seem to be in accord with the law of dwelling houses in burglary. *Quinn* v. *People*, 71 N. Y. 561 (1878). But it seems to be admitted that no analogy between the two can be drawn, because of the difference in the nature of the offense and the corresponding difference in the reason for the rules. *Stearns* v. *Vincent, supra; Hodder* v. *Williams* (1895), 2 Q. B. 663.

EMINENT DOMAIN.

Damages for Loss of Easement of Lateral Support of Street

The distinction, which has been drawn in damage cases for the loss of easement of lateral support of abutting property, in a street, between public and private use to which the street is about to be put, served as the basis in *In re Board of Transit Commissioners* (Appeals, N. Y., Dec. 1909) for a distinction between a governmental and a proprietary use of the street by the city authorities.

In this case, an abutting owner. owning no part of the street, was damaged by the settling of his land due to subway construction by the city of New York, in the street. The Court declared the subway a proprietary use of the street, inasmuch as it was conducted as a business enterprise, and its use restricted only to those licensed by the purchase of tickets.

The general rule, is, of course, that in such a case, there can be no recovery where the damage due to the loss of easement of lateral support is caused by use of the property for street purposes. *Cheever* v. *Stedd,* Fed. Cases No. 2,634; *Quincy* v. *Jones,* 76 Ill. 231; or where there is no negligence. *Park* v. *Seattle,* 5 Wash. 1.

But the Court here held that this case does not come within any well-recognized exception to the Constitutional provision that private property shall not be taken for public use without compensation,—such as sewers, grading streets, etc., and the plaintiff was therefore allowed to recover.

In Pennsylvania (*Stork* v. *Phila.,* 196 Pa., 101) the rule is that the absolute liability imposed by the constitution on the municipality is limited to that liability which is the direct, immediate, necessary, and unavoidable consequence of the act of eminent domain itself, irrespective of negligence.

INSURANCE.

Fire Insurance: Illegal Contract

Morin v. *Anglo-Canadian Fire Insurance Co.,* 12 W. L. R. Canada, 387 (1909), furnishes a somewhat novel question. The Insurance Co. insured property of the plaintiff, described in the policy as "a one-story frame shingle roofed building owned by the assured and occupied as a sporting house." In a suit brought on the policy, the defense raised the point, that it was an illegal contract and therefore void. It was found, that altho' the insurance company officials knew that the plaintiff intended to use the premises as a bawdy house, yet they themselves did not intend that it should be used that way. The Court refused to rule, that an insurance upon property illegally used at the time of the insurance was null and void, regardless of the intent and purposes of the parties. The contract of insurance was voidable at the option of the insurers upon their discovering the illegal purpose for which the property was being used. But this they knew all along and since they had not avoided the policy and also since the illegal use had ceased at the time of the fire, they are liable upon the policy.

The negative part of the Court's decision is unquestionably sound. There seem to be no authorities to the contrary and the tendency is certainly not to set aside contracts, on the broad general ground of public policy. But having decided that the contract itself is not illegal, there seems to be a difference of opinion, as to whether knowledge that a party is going to use property obtained under the contract in an illegal manner, makes it void. Some courts say yes; others like our

INSURANCE (Continued).

principal case hold something more is necessary, an intent that the other party should use the property in that manner. The cases usually arise under sales and leases of property and not under insurance, but the same rules would seem applicable. See *Reed* v. *Brewer*, 36 S. W. (Texas) 99 (1896); *Ernst* v. *Crosby*, 140 N. Y. 364 (1893); *Graves* v. *Johnson*, 156 Mass. 211 (1892); *Hanauer* v. *Doone*, 12 Wallace (U. S. Sup.), 342 (1870).

LIBEL.

Danger of Using a Fictitious Name

A reporter of the Sunday Chronicle sent to his paper a letter from a summer watering-place. The letter contained uncomplimentary matter concerning "Artemus Jones," a name invented by the reporter. For the publication of this letter, a gentleman whose name actually was Artemus Jones brought an action against the Sunday Chronicle, proved that several persons had thought him to be the Artemus Jones referred to, and recovered £1750 damages. The judgment was affirmed by the King's Bench Division in *Hulton* v. *Jones*, L. R. (1909), II K. B. D. 444, and by the House of Lords in L. R. (1910) Appeal Cases, 20. Both courts proceeded on the theory that in an action for libel the injury to the plaintiff was alone material. It is submitted that the learned justices failed to recognize that a defendant can only be liable in tort when he has failed in the performance of a duty which he owes the plaintiff. To require a writer to search all the directories in the land before daring to publish derogatory matter in connection with a fictitious name, is to impose an unreasonably high standard of care upon those who provide us with our daily literature.

For a closer analysis and more detailed criticism of this case, see a note in 58 U. of P. Law Review, 166 (Dec. 1909).

NEGLIGENCE.

Owner's Liability to Trespassers Without Leave, whose Presence is Tolerated

A landowner placed a horse which to his knowledge was ferocious, in a pasture field through which members of the public habitually crossed without leave, traversing a more or less defined path and passing through a gate which was sometimes locked and sometimes merely fastened on a latch. He had previously warned off persons crossing the field but had refused to take legal proceedings against them for trespass. The plaintiff, while so crossing the field without leave from the owner, was bitten by the horse. *Held*, to fasten a liability on the landowner for the injury to the plaintiff, it must be shown that he owed some duty towards such persons as the plaintiff; that under the above circumstances no affirmative duty rested on the landowner toward the plaintiff who was a trespasser, knowing well that he had no right to be there but merely assuming that as a result of the good nature of the owner, no action would be taken to interfere with him. The plaintiff took upon himself the risk of all dangers there might be in the field, if used in the way such a field is ordinarily used, and the use made by the owner for the pasture of his horse was such an ordinary use. Buckley, L. J., dissenting. *Lowery* v. *Walker*, 1910 1 K. B. 173.

NEGLIGENCE (Continued).

In effect the Court of Appeals has refused to recognize a duty existing in a fourth class of the relationships existing between the owners of land and persons coming thereon. The relationships toward the owner usually said to exist are: (1) bare trespasser, when the leading case of *Bird* v. *Holbrook*, 4 Bing.. 628 defines the extent of the duty owed by the landowner, (2) licensee, when the duty consists (*a*) in making the premises as bad in appearance as they are in fact or as it is usually stated, as good in fact as they appear; *Gaubret* v. *Edgerton*, L. R. 2 C. P. 371, and (*b*) in managing the usual business one conducts there so that the failure to use ordinary care will not cause injury to those licensees whose presence is to be expected, *Gallagher* v. *Humphrey*, 10 W. R. 664, and (3) invitee, when the duty of the owner of the premises includes use of reasonable care that the premises shall be safe, and that the kind of business conducted there shall be with due regard to the presence of such persons, *Indermaur* v. *Dames*, L. R. 1 C. P. 274. The plaintiff in the present case sought to bring himself within the second class at least, on the ground that though he was on the land without leave or circumstances implying intentional encouragement, yet there had been a tacit acquiescence in his presence from the refusal to vigorously interfere with him, which imposed a duty on the owner sufficient to support this action. This argument was refused by the court and the rights of the plaintiff present under such circumstances were held to rise no higher than those of a bare trespasser. Moreover, Kennedy, L. J., said that even had the plaintiff been a licensee, he had established no facts sufficient to enable him to recover, p. 197. Had that been the relation borne by the plaintiff to the owner, he accepted the use of the way subject to the owner's use of the field for ordinary purposes, which included the pasturing of horses and cattle of various degrees of temper. He must, therefore, to establish his case, show the adding by negligence or otherwise of some danger on the part of the owner, after permission or license given to the plaintiff. *Gallagher* v. *Humphrey, supra.*

For a discussion of the state of the authorities on the points involved, see comment on the decision of the same case in the Divisional Court, 58 *University of Pennsylvania Law Review* 110 (Nov. 1909).

Bargain Counter Rush

In a rush of customers occasioned by an announcement of special bargains at a certain counter near a stairway in the defendant company's store, the plaintiff was pushed down the stairway and injured. The Court overruled objections to a direction of a verdict for the defendant in the court below. *Lord* v. *Sherer Dry Goods Co.*, 90 N. E. (Mass. 1910) 1153.

It was shown in the present case that the injury was not due to any defect in the stairway or other premises of the defendant, but to the rush of customers down the stairway. The defendant was not negligent. The so-called "platform" cases were cited to the Court, but rejected as authority for the present case, and properly so. While these "platform" cases are applicable to elevated, subway and certain other classes of railways, it is submitted that they do not control the principal case. There is, in those cases, a better opportunity for observing the probabilities of injury, and, generally, admission to the platform is guarded by the railway company, and thus the number of persons to be

NEGLIGENCE (Continued).

allowed upon the platform at any given time is within the control of the company. Furthermore, the probability of injury is readily to be foreseen in those cases, while in the principal case, it was not so. Under the circumstances the railway company is guilty of actionable negligence toward a passenger who suffers injury from such overcrowding. For this general subject see notes to *Thompson* v. *Gardener, &c., Co.*, 118 Am. St. Rep. 459; 193 Mass. 133; 78 N. E. 854.

Liability of Ship Owner for Damages to Wharf

In the case of *Vincent, et al.* v. *Lake Erie Transportation Co.*, 124 N. W. (1910) 221, a peculiar combination of circumstances arose. The defendants were the owners of a steamer which moored at plaintiff's wharf in order to discharge her cargo. While there a violent storm arose, so that it would have been extremely hazardous for the master to have attempted to take her from the dock. He, therefore, allowed the vessel to lie alongside for two days until the storm abated, and several times changed the mooring lines as they became chafed or inadequate to secure her owing to the increasing violence of the gales. From the continual pounding of the ship against the pier it was damaged to a considerable extent, and on suit being brought a verdict for five hundred dollars was awarded the dock owners. On appeal the Court, in affirming the judgment, based their decision upon the theory that the ship owners had deliberately used the wharf for the purpose of saving ther own more valuable property, and having thus preserved their vessel at the expense of the plaintiffs', they should reimburse the latter for their damage. In support of this *Ploof* v. *Putnam*, 20 L. R. A. (N. S.) [1909] 152, is cited, where it was decided that a vessel's master was not guilty of trespass in tying up to a private dock to save his ship owing to stress of weather. The Court states that they have no doubt that if in such case, the dock was injured, the vessel's owner would be liable, and they also suggest that if in the principal case the master had made use of a valuable cable lying on the dock to better secure his vessel, he would be liable for damage thereto.

It would seem, however, that the Court omits from both of these supposed cases the fact that in neither of them was any payment made for the use of the dock or cable. In the principal case this element was present. Is it not to be supposed that a dock owner would fix his rates high enough to protect himself from injuries to his property not due to negligence? Admittedly he could not recover had the ship been hurled against the pier by a violent tempest, and yet he claims damages because a vessel lying at his wharf, where she has a lawful right to be and for which right she is paying, continues to lie there to save herself from destruction by a like act of God. Does he not rather hold out his dock as a place of safety for his customers while there, and taking the risk of damage not due to their carelessness reimburse himself therefor, through his charges? The question is a close one, but it would seem that perhaps on this reasoning the dissenting opinion is entitled to the greater weight.

NEGLIGENCE (Continued).

Live Electric Wires

An electric company maintained live wires, which were attached to a railroad bridge by wooden arms, at a distance of two feet out and away from the bridge. Quasi—licensees of the railroad used the bridge for foot-travel. A child who had been sitting on the guard-rail changed his position and was killed by the live wire. It was held that the electric company was not liable. *Netherly* v. *Twin State Gas & Electric Co.,* 75 Atl. Rep. 8 (1910.) There was nothing in the location of these wires tending to render the use of the bridge as a footpath dangerous, and there was nothing in the manner in which they were strung to allure children.

The general rule is, that the business of transmitting electricity must be transacted with a very high regard for the safety of the public, and the thoughtlessness of children must be taken into account; but an electric company is not an insurer of the safety of children. The duty of an electric company to insulate its live wires is limited to points where there is reason to apprehend that a person may come in contact with the wires.

Nelson v. *Branford Lighting Co.,* 75 Conn. 548, allowed recovery where a boy, amusing himself on a highway bridge, came in contact with an electric wire strung along the side of the bridge; the Court saying, "the purposes of a highway are not regarded as wholly restricted to serving the right of passage."

But maintaining naked electric wires on top of a shed was not such negligence as to permit recovery for injuries received by a boy in climbing the shed to rescue a ball, though such action was frequently done by the local youth. *Sullivan* v. *Boston, etc., Co.,* 156 Mass. 378.

In *Temple* v. *McComb City, etc., Co.,* 89 Miss. 1, the Court decided that, "the immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit which corporations stretching their wires over such trees must take notice of."

The test seems to be, whether or not the light company could have been expected to reasonably anticipate that children would do what the particular child injured did. *Sheffield Co.* v. *Morton,* 49 So. 772; *Keefe* v. *Narragansett Electrc Co.,* 21 R. I. 575.

In *Cumberland, etc., Co.* v. *Martin's Adm'r.*. 76 S. W. 394, it was held that defendant owed no duty to a bare licensee to properly maintain a wire. But where plaintiff is rightfully in the place where he was injured, under an implied license, the defendant owes him a duty to see that he is not injured while on the premises.

Bearning v. *South Bend Electric Co.,* 90 N. E. 786 (1910), holds the company liable for an injury done a person rightfully in the situation where he was injured, as the company owed a duty to such class of persons, and could have reasonably anticipated their presence. In this case, a pole of the defendant company had a live wire in a dangerous position upon it. The city maintained fire and police wires on the pole, and the plaintiff, an employee of the city, while climbing the pole, came in contact with the defendant's wire and was injured.

Rabb, P. J., says, "the duties and obligations of the respective parties to each other, and to their respective employés, in this case is very analogous to those of railways and other common carriers, whose lines intersect, or pass over, premises in which both have rights, as illustrated by the case of *Chicago* v. *Vandenberg.* 164 Ind. 470." In this case it is said (where the respondent was on the premises of the appellant when injured) "he was there not as appellant's servant, nor

NEGLIGENCE (Continued).

merely at its sufferance, but in a legal sense, upon the invitation given through the contract entered into between the two railroad companies. The appellant owed him a legal duty to exercise reasonable care to keep all parts of its road in a reasonably safe condition."

In *Bearning* v. *South Bend Electric Co.,* though there was no contract, yet an analogous duty may be inferred from the peculiar character of the business in which the parties were engaged, the relation of the city's wires to appellants' wires, and the imperative necessity in the successful operation of the wires of both, that the employés of each should use the same pole.

Liability for Blasting

The defendant was making excavations on his land, and it became necessary to blast. A water-main in a public street, twenty feet distant from where the blasts were fired, was broken by the concussions, and the basement of the plaintiff's house was flooded. It was held, since there was no proof of negligence on the defendant's part, he could not be held liable. *Derrick* v. *Kelly,* 120 N. Y. Supp. 996 (1910.)

It is settled law, that a person setting off blasts on his own property is responsible for damages caused by rocks, thrown on the lands of another. There is sufficient to sustain an action of trespass, irrespective of the question of negligence. *Scott* v. *Bay,* 3 Md. 431 (1853); *Hay* v. *Cohoes Co.,* 2 N. Y. 159 (1849). But there is a division of judicial opinion as to liability for injury to person or property from concussions caused by blasting. Here there is no technical trespass. Some jurisdictions, applying the doctrine of *Fletcher* v. *Rylands,* make no destruction and hold there is an absolute liability for all injuries caused by such a dangerous agency. This liability is held to arise from the extraordinary use to which the defendant is putting his property, which amounts to a *prima facie* nuisance, and which can not be justified by showing that due care was exercised. *Colton* v. *Onderdonk,* 69 Cal. 155 (1886); *Fitzsimmons* v. *Braun,* 199 Ill. 390 (1902); *Lougtin* v. *Persell,* 30 Mont. 306 (1904).

The weight of authority, however, seems to be in accord with our principal case, holding that where there is no actual physical invasion of personal or property rights, the injury is *dammun absque injuria,* so long as the blasting operatons are conducted with due care. *Booth* v. *Rome, etc., R. R. Co.,* 140 N. Y. 267 (1893); *Page* v. *Dempsey,* 184 N. Y. 245 (1906); *Semon* v. *Henry,* 62 N. J. L. 486 (1898). This would seem to be the better view, especially under the facts of the present case. Here blasting was necessary in excavating, and unless permitted, the value of the lot would have been seriously affected, if not rendered worthless. In such case blasting should not be included in the exceptional category of extra-hazardous occupations, and the doctrine of *Fletcher* v. *Rylands* should not apply. Of course, a higher degree of care, commensurate with the risk involved, should be required, but the injury should not be more than *prima facie* evidence of negligence.

TRESPASS.

Putting Out a Fire

The case of *Cope* v. *Shaye,* L. R. 1 K. B. 118 (1910), holds, that if a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights. Thus, the starting of a backfire in the heather is not a trespass by such a tenant, as he is entitled to destroy so much heather as is necessary to save the game from destruction by fire. He is doing no more than preserving his rights.

This is one of the very few modern cases in which the Court finds occasion to cite a Year Book. Darling, J., refers to a case in 9 Edw. 4, where Littleton, J., said: *"Et mesme le by si home fer negligence suffra son meason d'arder, jes que sue son vicin fuisse debrus, son meason fur eschue le peril que folt aveñ a moy fer l'arder, car si jeo suffra le meason d'estoier, il furr arder que jeo ne fuisse queincher le feive apres."* A dictum in *Carter* v. *Thomas,* 1 Q. B. 673 (1893), shows that the Court was inclined to adopt this view, so that an interesting question might have arisen in this case, whether if the defendant had been a mere stranger, and thinking that the plaintiffs' method of putting out the fire was inadequate, he could have entered and fought it himself.

It would seem, that if the defendant had leased the shooting rights merely, he would have less right to actively destroy a part of the leased property than if his lease gave him a wider privilege of possession.